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No. 92-238

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

NATIONAL SALVAGE & SERVICE CORPORATION,
Petitioner,

v.

COMMISSIONER OF THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,
Respondent.

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Respondent Commissioner of the Indiana Department of Environmental Management ("IDEM") attempts to discount the importance of IDEM's due process violation in this case by suggesting that no remedy exists for the violation and that all that is at stake is whether National Salvage and Service Corporation ("National Salvage") operated a "transfer station."[1] IDEM argues that because the legislature changed the definition of "transfer station"[2] after this case was filed to include National Salvage's business, the case is moot. IDEM claims that even if the original injunction was wrong, National Salvage now cannot operate without a permit and has no damage or remedy. That is not what this case is about, and the case is not moot.

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[1]IDEM raised this contention for the first time in its opposition brief.

[2]P.L. 19-1900, codified at Ind. Code 13-7-1-24.5.

A. What The Case Is About

This case concerns whether Indiana, consistent with due process, may enjoin National Salvage from operating without a permit based on an IDEM rule that has now been construed by Indiana's courts to mean exactly the opposite of what its words actually state and exactly the opposite of the way it always has been understood. The due process clause forbids Indiana from doing this. The requirement of fair notice means that a regulation saying "black" cannot be rewritten by a State to mean "white" and then applied to the citizenry as if the regulation had said "white" all along.

At the time National Salvage was enjoined, "transfer station" was defined as a facility where solid waste "is transferred into larger capacity vehicles or containers for further transportation. . . ." 329 Indiana

Administrative Code 2-2-1(b)(58) (emphasis added). National Salvage transported waste from a train car into a smaller vehicle, a truck. The Indiana Court of Appeals held that the IDEM definition of "transfer station" really meant a facility where waste is transferred from one vehicle or container into another for further transportation. The due process question this case raises is whether Indiana thus may destroy a citizen's business and expose the citizen to $25,000-per-day fines and potential criminal penalties based on the Indiana court's construction -- a construction that is at odds with the way IDEM told National Salvage the rule should be read and the way IDEM and everyone else (except the Indiana Court of Appeals) had always understood the rule.

B. Why The Issue Is Not Moot

This case is not moot, as IDEM suggests, for at last three reasons. First, if the petition for a writ of certiorari is granted and if the injunction is found to have been wrongfully issued, then National Salvage will have a substantial damage action against IDEM for wrongful injunction. Rule 65(C) of the Indiana rules of trial procedure provides:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who was found to have been wrongfully enjoined or restrained. No such security shall be required of a governmental organization, but such governmental organization shall be responsible for costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.[3]

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[3]Indiana's Trial Rule 65(C) differs from the parallel federal rule in that Indiana specifically guarantees government liability for wrongful injunction.

Indiana cases agree that damages for wrongful injunction are available from government agencies. See, e.g., Howard D. Johnson Co. v. Parkside Development Corp., 348 N.E.2d 656, 662 (Ind. App. 1976). In this case, the damages are significant. The uncontradicted testimony at trial showed that National Salvage had suffered damages of at least $4,000 per day since it was ordered to cease operating in October 1989. A claim for wrongful injunction is not a tort claim that might be barred under Indiana's tort claims statute, Ind. Code 34-4-16.5, as IDEM suggests in footnote 3 in its opposition brief.

Second, if the injunction is found to have been wrongfully issued, National Salvage will have an action for damages against IDEM arising under 42 U.S.C. § 1983 for IDEM's deprivation of National

Salvage's due process rights.[4] National Salvage already has filed a counterclaim against IDEM for damages, among other items of relief, arising from IDEM's wrongful prosecution of its enforcement action. See "Answer and Counterclaim for Preliminary and Permanent Injunctive Relief and Damages," Record of Proceedings, p. 33. The counterclaim will go forward if National Salvage is successful in this Court, and the counterclaim will provide redress for the due process violation that has occurred.[5]

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[4]Such a claim, like a claim under Rule 65(C) of Indiana's trial rules, would not be subject to the limitations of the Indiana Tort Claims Act. Felder v. Casey, 487 U.S. 131 (1988); Werblo v. Hamilton Heights School Corp., 537 N.E.2d 499 (Ind. 1989); Kellogg v. City of Gary, 562 N.E.2d 685 (Ind. 1990).

[5]National Salvage also may have claims for the taking of its property without compensation. See Nollen v. Calif. Coastal Comm'n., 483 U.S. 825 (1987); Lucas v. South Carolina Coastal Council, 1992 WL 142517 (June 29, 1992).

Third, P.L. 19-1990 (now Ind. Code 13-7-1-24.5) expressly provided at Section 19 that nothing in the law affects rights or liabilities accrued or legal proceedings commenced before the statute took effect. The new statute, by its express terms, does not moot any action arising from the meaning of the term "transfer station."

Neither of the cases cited in IDEM's brief suggests that National Salvage's due process claim is moot. In U.S. v. Provenzano, 469 U.S. 14 (1984), the plaintiff sued under the federal Freedom of Information Act and the subsequent amendment of that Act. While the case was pending, the law was changed such that the plaintiff now had access to the information he was suing to obtain. This Court had granted certiorari only on the issue affected by the amendment and thus "[t]he new legislation, as the parties agree, plainly renders moot the single issue with

respect to which certiorari was granted in each of these cases." 469 U.S. at 15. The portion of the case affected by the amended law had become moot only because the plaintiff now had access to the information he sought. Plaintiff had been completely satisfied through the amendment of the law so that he needed no remedy from the Court. As this Court has stated:

> Jurisdiction, properly acquired, may abate if a case becomes moot because (1) there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. When both conditions are satisfied, the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.

County of L.A. v. Davis, 440 U.S. 1379, 1380 (1979) (emphasis supplied). In this case, National Salvage in no way has been made whole by P.L. 19-1990. Nothing has occurred to "completely and irrevocably"

eradicate the effects of the wrongful injunction.

Similarly, in DeFunis v. Odegaard, 416 U.S. 312 (1974), a plurality of this Court held a third-year law student's challenge over his law school's admissions policy was moot since the student had nearly completed school and could make no showing of harm from the allegedly discriminatory admissions policy. The DeFunis petitioner was completely satisfied. National Salvage remains harmed. See also New York Transit Authority v. Beazer, 440 U.S. 568 (1978) (lawsuit by former heroin addicts over ordinance excluding such persons from employment held not mooted by change in statute to prevent discrimination).

If this case is moot, then Indiana may avoid liability for due process or other constitutional violations by simply amending its laws after a citizen institutes a challenge in court. P.L. 19-

1990 was enacted in direct response to this well-publicized lawsuit, and the Indiana legislature expressly provided that the new statute would not impair pending legal proceedings. Indiana cannot defeat the petition for a writ of certiorari, and thus avoid compensating National Salvage for the wrongful injunction it has suffered, by amending its statutes to "undo" a pre-enactment due process violation.

National Salvage does not contend that it is exempt from Indiana's police powers or Indiana's environmental rules and statutes. Indiana may, if it chooses, require interstate municipal waste shippers to install railcar liners or impose fines for leaks or smells. What Indiana cannot do is impose a permit requirement where the words of the rule do not state such a requirement exists, especially where the rule is being twisted to keep interstate shipments of waste out of Indiana.

Indiana's police powers are subject to the limits imposed by the U.S. Constitution.

IDEM observes that National Salvage has not applied for any "transfer station" permit. That is unsurprising as well as irrelevant, because by the time P.L. 19-1990 had been enacted to impose, for the first time, a permit requirement, National Salvage had been destroyed.

In sum, the due process question presented here is substantial and not moot. The petition for writ of certiorari should be granted.

Respectfully submitted,

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